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Ernest F. Roberts

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AN INTRODUCTION TO THE STUDY OF PRESUMPTIONS

ERNEST F. ROBERTS

(Part I of this article begins on page one of Volume Four.)

IV.

SOME ELEMENTARY PROBLEMS CONCERNING PRESUMPTIONS.

A. *Rebutting the Thayer Presumption.*

TAKING AGAIN OUR CLASSIC CASE premised on an accident involving a master's delivery truck being driven by X, a servant,¹⁵¹ we saw that a presumption of agency was created. That is, in a tort action against the master, if plaintiff can introduce evidence from which the trier of fact can find that X at the time of the accident was driving a truck owned by the master, plaintiff has survived the risk of not producing evidence of the Basic Fact, A. Further, if both sides rest at this moment and the trier of fact does find the Basic Fact, A, to be more probably than not true, then the trier of fact must, as a matter of law, also find that X was acting within the scope of his authority. This latter conclusion is the Presumed Fact, B. Thus plaintiff's case reads πW "Yes A" ($\rightarrow A \wedge B$).

The option then passes to defendant to rest, hoping that plaintiff has not persuaded the trier of fact that the Basic Fact is more probably than not true. Alternatively, defendant may seek to introduce evidence from which the trier of fact might infer the negative of the Basic Fact. The last, and most likely, course of conduct is that defendant will seek to rebut the presumption by introducing "some" evidence contra the Presumed Fact. If this last course is taken, then under the classic

151. See text pages 15-18 *supra*.

practice, it becomes a question for the law giver to decide whether or not the presumption has been rebutted.¹⁵²

Hitherto, we have assumed that when defendant introduced "some" evidence contra the Presumed Fact, the law giver will rule that the presumption is thereby dissolved, and, unless there is other evidence on the record tending toward the same result, plaintiff will suffer a directed verdict or nonsuit. The mechanics of the Thayer presumption have, therefore, been delineated as follows:

π W "Yes A" ($\rightarrow A \wedge B$)

But if: Δ W "No-B" \rightarrow no-B

Then: π W "Yes A" ($\rightarrow A \wedge B$)

This analysis, for the novice, is true; but it must be observed that analytically it is only true so far. This is so, unfortunately, because another factor must be interpolated into the equation; that is, how much evidence must be introduced by defendant to rebut the presumption? So far we have been content to say "some," but now that term must be defined with adequate particularity.

It is to be observed that plaintiff had the burden of introducing "some" evidence of A; that is, plaintiff ran the risk of non-production of evidence of the Basic Fact. Here, however, it must be noted that there is evidence, and then again, there is evidence. Thus, a vital question of degree remains to be dealt with, but since semantic evolution plays a significant part in this problem, a page of history is in order.

It is common knowledge that originally the jury was made up of the witnesses to the event giving rise to the litigation, and that it was only at the end of a slow, evolutionary process that the idea of the jury as a neutral trier of fact became conceptualized.¹⁵³ From this metamorphosis, two significant developments followed. First, in order to regulate what information the jury ought to use in deciding a particular controversy, the law of evidence began to be articulated.¹⁵⁴

152. See note 78 *supra* and accompanying text.

153. This is a greatly oversimplified general proposition but it will suffice for now. See 9 HOLDSWORTH, HISTORY OF ENGLISH LAW 127 (1926 ed.); THAYER, TREATISE 47-182.

154. THAYER, TREATISE 180-81: "But the greatest and most remarkable offshoot of the jury was that body of excluding rules which chiefly constitute the English 'Law of Evidence.' If we imagine what would have happened if the petit jury had kept up the older methods of procedure, as the grand jury in criminal cases did, and does at the present day,—if, instead of hearing witnesses publicly, under the eye of the judge, it had heard them privately and without any judicial supervision, it is easy to see that our law of evidence never would have taken shape; we should still be summing it all up, as Henry Finch did at the beginning of the seventeenth century,

Secondly, it followed that if the jury was to decide cases on the basis of evidence introduced through witnesses in accordance with certain rules called the "Law of Evidence",¹⁵⁵ then the jury ought to function only if there was evidence presented upon which it could premise its deliberations. Thus, the rule was enunciated that a verdict would be directed against a plaintiff by the law giver if plaintiff did not come forward with proof.¹⁵⁶

In its early stages, however, the principle that plaintiff, upon whom the burden of persuasion rested, ought to come forward with proof required only that plaintiff introduce "some" proof in the sense of "any" evidence. Whether evidence had in fact been introduced was the only question for the law giver, since sufficiency of evidence was always a question for the trier of fact to determine.¹⁵⁷ In short, this was the "scintilla" rule. The difficulty with this rule, however, was that "any"¹⁵⁸ evidence was not always "enough" evidence to support a verdict for the party having the burden of persuasion, so that the law giver often had to submit a case to the jury knowing full well that a verdict for the proponent would be set aside.¹⁵⁹

L'evidence al jurie est quecunque chose que serve le partie a prouver l'issue per luy. This it is,—this judicial oversight and control of the process of introducing evidence to the jury, that gave our system birth; and he who would understand it must keep this fact constantly in mind."

155. GILES, *THE CRIMINAL LAW* 123 (1954): "The law of evidence is a manifestation of the instinct of self-preservation. Without it the courts would be swamped with a mass of irrelevancies and hopelessly prejudiced by *non sequiturs*. Regarded broadly it is a golden treasury of restrictive practices. It hedges round the testimony which a court may hear, limiting it to what is immediately relevant to the issue in dispute and allowing evidence to be given only by those best qualified to give it—that is, with some exceptions, to those who can say they have seen something, heard something, tasted something, felt something, or smelt something which will assist the court in coming to a decision."

156. This has been traced back to the year 1725. See *Syderbottom v. Smith*, 1 Strange 649, 93 Eng. Rep. 759 (K.B. 1725). See also *Company of Carpenters v. Hayward*, 1 Douglas 374, 99 Eng. Rep. 241 (K.B. 1780). *Smith, The Power of the Judge to Direct a Verdict; Section 457-a of the New York Civil Practice Act*, 24 COLUM. L. REV. 111 (1924).

157. *Richardson v. City of Boston*, 60 U.S. (19 How.) 263, 268-269 (1856): "As it is the duty of the jury to decide the facts, the sufficiency of evidence to prove those facts must necessarily be within their province If there be 'no evidence whatever,' as in the case of *Parks v. Ross*, (11 How., 393) to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court. *If this were not so, the court might usurp the decision of facts altogether, and make the verdict but an echo of their opinions.*"

158. Any evidence means any *relevant* evidence, which, after all, may not carry anyone very far along the road to forming a belief about issue B.

MODEL CODE OF EVIDENCE rule 1 (12) (1942):

"Relevant Evidence means evidence having any tendency in reason to prove any material matter and includes opinion evidence and hearsay evidence."

UNIFORM RULES OF EVIDENCE rule 1 (2) (1953):

"Relevant Evidence means evidence having any tendency in reason to prove any material fact."

159. *Ewing v. Goode*, 78 Fed. 442, 443 (1897): "In the Courts of this and other states the rule is that if the party having the burden of proof offers a mere scintilla

The last half of the nineteenth century saw yet another step taken in this evolutionary process when a new rule was articulated whereby plaintiff's risk of non-production was sharply increased. This change was accomplished simply by interpreting "some" not merely as "any" but as "enough" to support a verdict for plaintiff. In Pennsylvania, for example, the new rule was announced with a flourish:

"Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established."¹⁶⁰

Thus, upon a proper motion at the close of plaintiff's case the law giver must answer the question *posed* in the form espoused by Dean Wigmore:

"Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?"¹⁶¹

of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the Court must submit the issue thus made to the jury, with the power to set aside the verdict, if found against the weight of the evidence."

160. Hyatt v. Johnson, 91 Pa. 196, 200 (1879). Compare Thomas v. Thomas, 21 Pa. 315 (1853); Fitzwater v. Stout, 16 Pa. 22 (1851). *Accord*, Dauphin Improvement Co. v. Munson, 81 U.S. (14 Wall.) 442, 448 (1871): "Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule: that, in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed." This new rule can be traced back to Justice Williams in Toomey v. London Ry. Co., 3 C.B. (N.S.) 146, 150, 140 Eng. Rep. 694, 696 (C.P. 1857): "It is not enough to say that there was some evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence."

161. 9 WIGMORE, EVIDENCE § 2494 at 299 (3d ed. 1940). See also WIGMORE, EVIDENCE § 448 (1) (Stud. ed. 1935). This test which plaintiff must surmount has aptly been termed a "rigorous practice." See note 80 *supra*. It is quite obvious, of course, that the tendency for the past two hundred years has been to narrow the area in which the jury qua trier of fact operates as a judicial mechanism. Not only does the law giver direct a verdict against plaintiff in the event that not enough evidence is introduced to warrant jury deliberations, the law giver can often direct a verdict for plaintiff in the instance of "overwhelming" evidence which no reasonable jury could help but believe. *But see* Savidge v. Metropolitan Life Ins. Co., 380 Pa. 205, 110 A.2d 730 (1955); Nanty-Glo Boro. v. American Sur. Co., 309 Pa. 236, 163 Atl. 523 (1932).

Not only has a floor and a ceiling been constructed to mark off the area of jury dominion, the growing remittitur and additur practice promises to wall in the scope of its powers even in those cases which do properly get to the jury.

This trend has not gone unnoticed by its critics. For instance, see Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 615 (1939): "Such a reversal of opinion, if it were isolated, might have little significance, but when many other courts

An analogous problem arises when the law giver must decide whether a presumption has been rebutted by defendant's evidence contra the Presumed Fact. Here again we have assumed that the presumption dissolved as a matter of law whenever "some" evidence no-B was introduced; but does this "some" mean "any" or "enough" evidence no-B? Again the codifiers are now in agreement that the latter definition is correct:

"... [W]here the basic fact of a presumption has been established in an action, the existence of the presumed fact must be assumed unless and until evidence has been introduced which would support a finding of its non-existence."¹⁶²

"... [T]he presumption does not exist when evidence is introduced which could support a finding of the non-existence of the presumed fact..."¹⁶³

B. *Conflicting Presumptions.*

There also exists in rare cases the possibility that presumptions will operate in favor of both parties to an action at law. For example, *Turner v. Williams*¹⁶⁴ saw a suit brought against the administrator of a woman for money had and received to the use of plaintiff's testator. Plaintiff based his cause of action on allegations that the woman had, through fraud, induced testator to marry her by falsely representing that she was divorced from her previous husband, and, after the second marriage, had induced testator to procure life insurance in her favor. The case turned on the question of the validity of the

throughout the country are found to be making the same shift . . . there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration for democratic government, and the judiciary's desire for the orderly supervision of public affairs by judges." While Professor Howe was attacking the constriction of the jury's function on the criminal side, Mr. Justice Black observed the same trend on the civil side. See *Galloway v. United States*, 319 U.S. 372, 404 (1942) (dissenting opinion): "The rule that a case must go to the jury unless there was 'no evidence' was completely repudiated in *Schuylkill v. Dauphin Improvement Co.* . . . upon which the Court today relies in part. There the Court declared that 'some' evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks 'a jury can properly proceed.' The traditional rule was given an ugly name, the 'scintilla rule,' to hasten its demise *The same transition from jury supremacy to jury subordination through judicial decisions took place in the State courts.*" (Emphasis added.)

Concomitantly with the increased rigor of the test applied to plaintiff at the close of his case, some states developed the practice of granting compulsory non-suits instead. The compulsory non-suit in this sense was unknown at common law, but the courts preferred it over the directed verdict because the non-suit did not prevent bringing another action. The trend today, however, is toward making the distinction more formal than real.

162. MODEL CODE OF EVIDENCE rule 704 (1) (1943).

163. UNIFORM RULES OF EVIDENCE rule 14 (1953).

164. 202 Mass. 500, 89 N.E. 110 (1909).

second marriage and whether or not the woman had in fact obtained a divorce from her first spouse.

There was no direct evidence of a divorce, but there was evidence that the woman had been living with her first husband shortly before her second marriage. On the one hand, therefore, there existed a presumption that the first marriage had continued intact; while on the other hand, there was a presumption that the woman was innocent of bigamy; that is, had obtained a divorce. Faced with presumptions leading to contradictory presumed facts, the court had either to choose one presumption in preference to the other or to proceed on the theory that the conflicting presumptions rebutted each other. The court chose the latter alternative.

"There is no 'sacramental force' in the presumption of innocence over the presumption of the continuance of life or any other status in its nature likely to endure. Presumptions are rules of convenience based upon experience or public policy, and established to facilitate the ascertainment of truth in the trials of causes. There are a few instances of conclusive presumptions; but, where there are conflicting presumptions, one is not as matter of law stronger or weaker than another. The whole case then is thrown open to be decided as a fact upon all the evidence. It is for the sound judgment of the jury to weigh all the circumstances, including the characters of the persons involved and the probability of different lines of conduct, and determine where the truth lies as a matter of common sense unfettered by any arbitrary rule."¹⁶⁵

Thus it is that there is authority for the view that conflicting presumptions destroy one another and the existence or nonexistence of the presumed fact must be determined exactly as if no presumption had ever been applicable in the action.¹⁶⁶ Unfortunately, it has been

165. 202 Mass. 500, 505, 89 N.E. 110, 112 (1909).

166. MODEL CODE OF EVIDENCE rule 704, Illustration 2 (1943): "In proceedings to recover compensation for the death of a deceased workman, W, claimant A establishes the fact that she went through a ceremonial marriage with W in May, 1930, and lived with him until 1936, and claimant B establishes the fact that she went through a ceremonial marriage with W in June, 1938. The fact established by A raised a presumption of the validity of the 1930 marriage and a presumption of continuance of the marital status between A and W. The fact established by B would ordinarily raise a presumption of the validity of the 1938 marriage. The presumed fact of continuance of the marital status is inconsistent with the presumed fact of validity of the second marriage. Therefore, the issue is to be determined exactly as if neither presumption were ever applicable in the action."

See also Denning, *Presumptions and Burdens*, 61 L.Q. REV. 379, 383 (1945): "For instance, when a man has gone through a ceremony of marriage with three women and is charged with bigamy in marrying the third during the life of the second, there may be a presumption of innocence on the occasion of the second marriage so as to presume its validity . . . which may conflict with a presumption in favor of the duration of the life of the first woman Any nice discussion on con-

asserted that the prevailing American practice is to weigh the conflicting presumptions and rule that the stronger destroys the weaker.¹⁶⁷ Despite Thayer's objection that this practice of weighing conflicting presumptions is "exotic, ill adapted to an English or North American climate,"¹⁶⁸ the cases illustrate that it is common practice. Thus, faced with a choice between a presumption that certain public officials had done their duty and a presumption that a voter had obeyed the law, one court concluded:

"These two presumptions are incompatible: both cannot stand. It is more charitable to suppose that the moderators have made a mistake than that the voters have done some act by which they have incurred the penalty of temporary disfranchisement. We think the presumption in favor of the voter must prevail."¹⁶⁹

This points up the interesting possibility that if this view is followed to its logical extreme, then a list of presumptions in order of strength might be created from the strongest down to the most insignificant.

Conflicting presumptions is foreign to English law. The preferable approach in such a case would be to recognize that the presumptions are provisional presumptions only which can and should be discarded when they conflict, leaving the issue to be determined by the jury on the facts, the legal burden being in the last resort decisive."

See also: Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 916-19 (1931). The most colorful expression of this rule was stated in *Yarnel v. Kansas City, Ft. Scott & M.R. Co.*, 113 Mo. 570, 579, 21 S.W. 1, 3 (1893), when the court observed that "one presumption rebuts and neutralizes the other, like the conjunction of an acid and alkali." Wigmore, in turn, aptly refers to the whole topic as one wrought with "vain speculation and logical unrealism." WIGMORE, EVIDENCE 454 (Stud. ed. 1935).

167. MORGAN, BASIC PROBLEMS OF EVIDENCE 36 (2d ed. 1957): "But most of the decisions determine which of the conflicting presumptions has the stronger reason back of it, and treat that presumption as if it stood alone in the action."

168. THAYER, TREATISE 343.

169. *Phelan v. Walsh*, 62 Conn. 260, 291, 25 Atl. 1, 4 (1892). See *Donovan v. Security-First Nat'l. Bank*, 67 Cal. App.2d 845, 155 P.2d 856 (1945), *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756 (1896); *Sillart v. Standard Screen Co.*, 119 N.J.L. 143, 194 Atl. 787 (1937). Also see cases collected in Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 932, note 41 (1931). In the same note Professor Morgan takes a stand in favor of the anti-Thayer view. In turn, Professor Chafee suggested that rather than weigh the relative strengths of the conflicting presumptions one ought instead look at the "logical core" inherent in each one. Chafee, *Developments in the Law—Evidence—1932*, 46 HARV. L. REV. 1138, 1143 (1933); *Progress of the Law, 1919-21, Evidence*, 35 HARV. L. REV. 303, 315 (1922). Wigmore, on the other hand, attempted to treat several presumptions as "successive" rather than as conflicting. 9 WIGMORE, EVIDENCE § 2492 (3d ed. 1940): "Presumptions are sometimes spoken of as 'conflicting.' But, in the sense above examined, presumptions do not conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time upon a given party. . . . There may be successive shiftings of duty, by means of presumptions successively invoked by each; but it is not the one presumption that overturns the other, for the mere introduction of sufficient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions. . . ."

As has already been pointed out, the article on Evidence in Corpus Juris Secundum lists 113 presumptions,¹⁷⁰ a fact which might give some insight into the esoteric exercise in abstruse categorization which beckons some future pedant.¹⁷¹

V.

A PROLEGOMENON TO A THEORY OF PRESUMPTIONS.

A. *Statement of the Problem.*

Thus far we have assumed the existence of presumptions and we have described how they work in the abstract, that is, we have been satisfied with mechanistic and descriptive analysis. We have not thus far, however, attempted to illustrate with adequate particularity the relationship between these particular mechanisms and the warp and woof of the law at large. Therefore, the problem remains as to whether a consistent theory of presumptions can be articulated which will integrate the presumption as a mechanism into an appropriate position in the juristic system.

Thayer, for example, saw presumptions as a many-splendored abstract thing:

"Presumptions are aids to reasoning and argumentation, which assume the truth of certain matters for the purpose of some

170. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).

171. The proposed draft of the MISSOURI CODE OF EVIDENCE, 1948, attempted this very thing.

"Section 406. CONFLICTING PRESUMPTIONS.

a. When conflicting presumptions of equal weight arise in relation to the same matter neither presumption shall be recognized.

b. When one presumption is stronger than a contrary presumption the stronger presumption shall prevail as for example, but not exclusively, (1) the presumption of innocence shall prevail over all conflicting presumptions; (2) the presumption of legality of a last marriage shall prevail over any contrary presumptions that would tend to support the legality of the prior marriage; (3) a presumption of death of a person absent from home or from the state for seven years without being heard from shall prevail over the presumption of the continuance of a prior status,—life; and (4) the presumption of legitimacy of children shall prevail over the presumption of continuance of a prior marriage.

COMMENTS

In many cases conflicting presumptions of equal weight arise with regard to the same issue. In such situations the one presumption rebuts and neutralizes the other presumption, leaving the parties to their proof. The four situations recited in paragraph b. *supra*, are examples where one presumption is stronger than contrary presumptions, and are examples where such stronger presumptions prevail."

UNIFORM RULES OF EVIDENCE rule 15 (1953) takes the same approach. It adopts the idea that when there are apparently conflicting presumptions the trial judge must apply the one "founded on the weightier considerations of policy and logic," but, if there is "no such preponderance both presumptions shall be disregarded."

given inquiry. They may be grounded on general experience, or probability of any kind; or merely on policy and convenience. On whatever basis they rest, they operate in advance of argument or evidence, or irrespective of it, by taking something for granted; by assuming its existence. When the term is legitimately applied it designates a rule or proposition which still leaves open to further inquiry the matter thus assumed. The exact scope and operation of these *prima facie* assumptions are to cast upon the party against whom they operate, the duty of going forward, in argument or evidence, on the particular point to which they relate. They are thus closely related to the subject of judicial notice; for they furnish the basis of many of those spontaneous recognitions of particular facts or conditions which make up that doctrine. Presumptions are not in themselves either argument or evidence, although for the time being they accomplish the result of both. It would be as true, and no more so, to say that an instance of judicial notice is evidence, as to say that a presumption is evidence. Presumption, assumption, taking for granted, are simply so many names for an act or process which aids and shortens inquiry and argument. These terms relate to the whole field of argument, whenever and by whomsoever conducted; and also to the whole field of the law, insofar as it has been shaped, or is being shaped by processes of reasoning. That is to say, the subject now in hand is one of universal application in the law, both as regards the subjects to which it relates and the persons who apply it."¹⁷²

Wigmore, on the other hand, while adopting Thayer's explanation of the mechanism of presumptions, was content to take a functional approach and explain the mechanism in terms of the burden of proof.¹⁷³ Alternatively, Judge Maxey suggested a rationale for the creation of presumptions and a division of presumptions into functional categories:

"Presumptions arise as follows: They are either (1) a procedural expedient, or (2) a rule of proof production based upon the comparative availability of material evidence to the respective parties, or (3) a conclusion firmly based upon the generally known results of wide human experience, or (4) a combination of (1) and (3). The presumption as to the survivorship of husband and wife meeting death in a common disaster is a procedural expedient. It is not based on extensive data arising from human experience. An unexplained absence for seven years raises the presumption of death of the absentee upon the expiration of the last day of the period. This also is a procedural expedient—an arbitrary but necessary rule for the solution of problems arising

172. THAYER, TREATISE 314-15.

173. 9 WIGMORE, EVIDENCE §§ 2483-2540 (3d ed. 1940).

from unexplained absences of human beings. An example of (2) is the rule requiring persons on trial for doing certain acts which are illegal if done without a license to produce evidence that they belong to the class privileged by license. . . . The following are examples of (3): (a) an envelope properly addressed and stamped will reach the addressee if the latter is alive; (b) a child born during the wedlock of its parents is legitimate; (c) a person who drives across a railroad crossing will show due care. . . . A presumption that a debt is paid after a lapse of a definite long period of time is both a procedural expedient (1) and a conclusion based on the results of wide human experience (3)."¹⁷⁴

All of these theories may be true so far, but whether a presumption is regarded as an universal intellectual solvent or as a mere procedural expedient, the relationship between presumptions and the judicial process taken as a whole remains to be explained. Thus, it is suggested, that the presumption concept fits into several entirely different interstices in the judicial framework and that, chameleon-like, the concept of presumption adopts a different connotation with each setting.¹⁷⁵

B. *Presumptions and the Judicial Process.*

1. Law-Making Tool.

It has now become common knowledge that the judicial power includes the authority to make law, that is, to articulate decisional norms.¹⁷⁶ But in less sophisticated times the judiciary was loathe to admit that it exercised a legislative function and, instead, purported

174. *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 504-05, 173 Atl. 644, 648 (1934).

175. MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 183 (1947): " . . . This word presumption has suffered badly from rough and careless handling. It has been used as a synonym for inference and sometimes as the operative part of weaselworded formulae for saying that from the judicial or legislative point of view certain things are taken as so and attempts to contradict them will be futile."

See: MORGAN, MAGUIRE AND WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 440-43 (4th ed. 1957); Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 324-31 (1952); Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 195-209 (1953).

176. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 10 (1921); "I take judge-made law as one of the existing realities of life."

See: FRANK, LAW AND THE MODERN MIND 33-41 (6th ed. 1949); RODELL, WOE UNTO YOU, LAWYERS 45-70 (2d ed. 1957). Also Mr. Justice Black in *Francis v. Southern Ry. Co.*, 333 U.S. 445, (1942): "It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A reevaluation of social and economic interests affected by the rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment."

to apply existent "law" discovered by reason operating upon experience.¹⁷⁷ The judges, however, did claim the power to promulgate rules of procedure and evidence to expedite the trial as a rational process. As has already been observed, however, the judges could make new law by manipulating presumptions.¹⁷⁸ In this sense, therefore, presumptions are not concerned with the problem of proof, but rather, are part of a now outmoded myth.

2. Judge-Made Rules of Law.

Alternatively, a great many decisional norms promulgated by the common law judges have retained their disguise and have never been flatly articulated as rules of substantive law. Thus, the presumption of consideration behind a sealed instrument means that a seal is good consideration.¹⁷⁹ Again, while it is often said that a child under seven is conclusively presumed to be incapable of committing a felony, what is meant is that such a child cannot be lawfully convicted of a felony.¹⁸⁰ Properly speaking, such pseudo-procedural aphorisms, disguising rules of substantive law, have nothing to do with the subject of presumptions.¹⁸¹

3. Tool of Reason.

It has often been observed that the doctrine of judicial notice is subject to abuse when an appellate tribunal invokes it to justify an *a priori* conclusion.¹⁸² As some practicing lawyers can attest, this

177. See, for example, CARTER, *LAW, ITS ORIGIN, GROWTH AND FUNCTION* (1908).

178. See text *supra* at note 70. Smith, *Surviving Fictions*, 27 YALE L.J. 147, 155 (1917): "The expression 'conclusive presumption' might be taken to be a term used solely in the statement of a rule (a statement of principle) in the law of evidence, and not concerned with rules of substantive law. Even if, however, its application is thus limited, its use would be open to criticism. But the expression 'conclusive presumption' is used today as a clumsy and roundabout method of stating a rule of substantive law; or rather, as giving a fiction reason for a rule of substantive law."

179. See text *supra* at page 14.

180. See MORGAN, *BASIC PROBLEMS OF EVIDENCE* 30 (2d ed. 1957).

181. Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 198-99 (1953): "That the so-called 'conclusive' or 'irrebuttable presumptions' are really not different from rules of substantive law is well known and recognized by innumerable judicial decisions. Such 'presumptions' serve the same general purpose in our law as fictions. By expressing what are in reality rules of law in the form of rules of evidence, the courts have a method by which the law can change its content without ostensibly announcing new rules." Alternatively, canons of statutory construction are often couched in terms of presumptions, as, for example, the presumption that the Legislature does not intend a result that is absurd, impossible of execution, or unreasonable. See *Altrere v. Allentown Officers' & Employees' Retirement Bd.*, 368 Pa. 176, 182, 81 A.2d 884, 887 (1951).

182. MORGAN, *SOME PROBLEMS OF PROOF* 67-68 (1956): "Judicial notice may be a dangerous device in the hands of a judge who is opinionated or conceited or who inadvertently assumes the non-existence of pertinent data. . . . There are decisions

use of judicial notice leads at times to astounding absurdities, such as the judicial observation of the "fact" that boys are better swimmers than girls.¹⁸³ And, as Thayer equated presumptions with judicial notice as mechanisms used in trials to effect proof, without themselves being proof,¹⁸⁴ so, too, presumptions are subject to the same use.

But the assertion that this is an inexcusable abuse may, to a certain extent, overlook the realities of the existent situation in which the jurist writing an opinion finds himself. The "law" used to decide a case is one thing, but the "law" articulated in an opinion is something else again. The published opinion must appear obvious and absolute in order to have force: it must order and arrange the material if it is to satisfy man's craving for the rational.¹⁸⁵ Thus, the opinion must have a foundation in facts upon which the appropriate legal maxims can be built to support the opinion's conclusion in some kind of ordered rationality. Rare indeed, however, is the perfect record where even minor facts are explicitly made certain. Rarer indeed is the opinion in which intermediate propositions are not necessary and for which some justification is present. Thus, in these instances, the invocation of presumptions serves to shore up the foundations of an otherwise unsatisfactory intellectual edifice.

For instance, if a statute is involved in an opinion, the jurist is not content to use as his basic premise the simple assertion "The statute is." He must give life to the statute within the context of the system: he must make the statute cognizable within the dialectic of the local jurisprudence. Thus, the law giver judicially notices the domestic law, thereby bringing the statute within the case, and then he is forced by the system to apply it since it controls him. This is so because this statute must by law be known to the law giver, and, once known, it is "presumed to be constitutional." It is not, therefore,

of the United States Supreme Court declaring unconstitutional legislation designed to change long accepted legal concepts because the Court or a majority of its members deemed to be incontrovertibly true what many informed people and some later courts believed to be demonstrably false."

183. *De Simone v. City of Philadelphia*, 380 Pa. 137, 142, 110 A.2d 431, 433 (1955).

184. THAYER, *TREATISE* 314-15. Quoted *supra* at note 172. Although both judicial notice and presumptions are mechanisms effecting proof without themselves being proof, this is the only similarity between them. See MORGAN, *SOME PROBLEMS OF PROOF* 59-60 (1956): "It will be observed that Thayer says 'taking judicial notice of a fact is merely presuming it.' . . . Practitioners can be thankful that the courts have not as yet beclouded the law of judicial notice by treating it as a part of the law of presumptions. Thayer does not even mention it in his essay on 'Presumptions,' though he speaks of a presumption and of judicial notice, each in its place, as a *prima facie* assumption. And it is to be fervently hoped that the courts will not enmesh the problems of judicial notice in the language of presumptions."

185. NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* 5 (1938): "Law must appear as natural, obvious, and absolute in order to have force with which to impose itself upon those whom it would govern."

merely an existent norm, it is a compulsive and vibrant one impressed on the judge and the litigants by the system.¹⁸⁶

Alternatively, assume that at common law plaintiff sued defendant railroad company alleging that he was a fireman on one of defendant's locomotives, that during a stop he had alighted momentarily from the cab to put out the kerosene headlamp, that he began to climb aboard again, and that at this instant the engine house steps broke, causing him to fall and be injured. Defendant offered proof that maintenance of the engine cab steps was within the province of the engineer. The trial judge charged the jury, *inter alia*, that plaintiff could not recover if the engineer was a fellow servant.¹⁸⁷

The appellate court reversed, as well it might, because the charge did not allocate the burden of persuasion as to the fellow servant doctrine. Was the onus on plaintiff to prove the engineer was not a fellow servant, or was the onus on defendant to prove that he was? In any event, the court decided that the burden rested upon plaintiff. The court then proffered the reasons why the "law" dictated this choice. First, the trial judge could not invoke judicial notice to solve the problem; that is, the relationship between a locomotive engineer and fireman was a question of fact. But this only supported the conclusion that the burden of proof rested on the parties, but it did not explain the choice as between the parties. This the court did by invoking the principle that the burden ought to rest on plaintiff because a presumption existed that two employees of the same employer working together in close proximity are fellow servants.¹⁸⁸ The "presumption," however, is not an operative one, that is a true presumption, simply because it operates against the party having the burden of proof. This presumption merely is a symbol representing the fact that the burden of proof is upon plaintiff. Thus, the rationale of the case is that the burden of proof is on plaintiff because the burden of proof (symbolized by the presumption) is upon plaintiff! It is manifest, therefore, that this "rationale" is nothing more than an example of judicial hyperbole interpolated into the opinion to support an *a priori* conclusion fixing the burden of proof upon plaintiff.

186. For an outline of the intellectual frame of reference within which lawyers operate see Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 269-72 (1944).

187. *Kansas City, Ft. S. & M. Ry. Co. v. Becker*, 63 Ark. 477, 39 S.W. 358 (1897).

188. 63 Ark. 477, 39 S.W. 358, 359-60: "Upon the plaintiff devolved the burden of proving his cause of action. The fireman and engineer were in the common service of the defendant, working together to a common purpose, in the same department, as shown by the evidence. The presumption is they were fellow servants; and it devolved upon the plaintiff to show that they were not. . . . This court cannot take judicial notice of the supremacy or subordination of one to the other, if any exist."

That this is not a true presumption, but instead is an example of "the fallacy of the misplaced presumption," is illustrated by an analogous situation which occurred in Massachusetts. There the legislature was guilty of the same fallacy when it promulgated a presumption of due care, to-wit, that in all actions to recover damages for causing the death of a person, the person killed shall be presumed to have been in the exercise of due care *and* contributory negligence shall be an affirmative defense to be answered and proved by the defendant.¹⁸⁹ Thus, here the converse situation was created, with the burden of proof resting on defendant and a "presumption" aiding plaintiff.

But, it must be inquired, is it not rather redundant to give a party the benefit of a presumption when the burden of proof is put on the other party? If the defendant does not introduce some evidence of contributory negligence, this fact alone will keep him from the jury on that issue and will result in an appropriate finding as a matter of law. Alternatively, once he introduces some evidence, the presumption is no longer a relevant factor in the case. Thus, Judge Lummus¹⁹⁰ extrapolated a cogent appraisal of this kind of "presumption":

"Indeed, a presumption, using the word in its proper and technical sense, can have no operative effect unless it assists the party having the burden of proof."¹⁹¹

"A presumption is a rule of law which compels the conclusion that a fact exists, in the absence of some required quantity of evidence or degree of proof to the contrary. It is impossible to weigh a rule of law, or to attribute to it persuasive force as evidence of fact. . . . A presumption can have no greater effect than to control unless rebutted by proof to the contrary. When the statute cast upon the defendant the burden of proving by a preponderance of evidence contributory negligence on part of the plaintiff, it did everything for plaintiff that a presumption of his good care could do. . . . The statutory presumption of due care is like a handkerchief thrown over something covered by a blanket also. . . . We are dealing with a so-called presumption which has no operative effect and only a verbal or theoretical existence, and a discussion of the working of genuine presumptions would be superfluous."¹⁹²

189. MASS. GEN. LAWS ch. 231, § 85 (1932): "In all actions, civil and criminal, to recover damages for injuries to the person or property or for causing the death of a person, the person injured or killed shall be presumed to have been in the exercise of due care, and contributory negligence on his part shall be an affirmative defense to be set up in the answer and proved by the defendant."

190. See text *supra* at notes 136, 146.

191. Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E. 2d 135, 139 (1944).

192. Brown v. Henderson, 285 Mass. 192, 196, 189 N.E. 41, 43-44 (1934) (concurring opinion). But see Hartford Fire Ins. Co. v. Horne, 338 P.2d 1067 (N.M. 1957).

Again, *Patterson v. Prior*¹⁹³ affords an excellent example of the use of presumptions to perfect a record. There plaintiff had been unlawfully imprisoned and during his imprisonment he had done labor for defendant, the lessee of the state prison. Upon his discharge under habeas corpus, plaintiff sued defendant for the value of his services. The case was disposed of in the trial court upon an agreed statement of facts, judgment was entered for plaintiff and defendant moved for a new trial on the ground of insufficient evidence to support the verdict. The basic issue in the case was simple enough: that is, whether on these facts plaintiff could recover for unjust enrichment. Having concluded that the answer was "yes", however, the appellate court was faced with the problem of justifying the conclusion within the context of the existent law.

While the result was eminently just, the court could not at the time have relied on any rule of restitution to justify its holding since that branch of the law was, and still is, in the process of being rendered articulate.¹⁹⁴ The court, therefore, had to make rational its conclusion within the context of the existent rules of law. In order to do this, it had to decide whether plaintiff had a cause of action in assumpsit in the first place. It rested its justification for an affirmative answer upon the accepted axiom that plaintiff had the right to waive a tort and sue in assumpsit. But this in turn raised the question whether a tort had been committed to bring into operation the option; and, inferentially, if tort is premised upon the notion of fault, whether defendant had wronged plaintiff. The answer to this, however, was elementary if defendant knew that plaintiff had been unjustly imprisoned and defendant helped to keep him there. While this fact did not appear in the agreed statement of facts in the record,¹⁹⁵ the court solved the "problem of the missing fact" by invoking the presumption that defendant knew the law! Thus, the agreed statement of the facts provided a sufficient basis upon which *to rule as a matter*

193. *Patterson v. Prior*, 18 Ind. 440 (1862).

194. See Carlston, *Restitution—A Search for a Philosophy*, 6 J. LEGAL EDUC. 330 (1954).

195. The agreed statement of facts consisted of the following: "It is agreed in this case that the plaintiff, said James Prior, was imprisoned in the state prison, in the custody of said Miller, as warden thereof, under and by virtue of a judgment of the court of common pleas of Vanderburgh County, a certified copy of which judgment is filed with defendant's answer. That during his confinement he did work and labor as a criminal; said work and labor were of the value of \$225; said Patterson during all the time of the said Prior's confinement in said state prison was the lessee thereof, and said work and labor were done by the order of said Miller, and said Patterson received all the benefit of said labor as such lessee. The time of said Prior's confinement commenced on the 12th of September, 1853, and he was discharged therefrom, and ordered to be returned to the sheriff of Vanderburgh County upon a writ of habeas corpus sued out on the first day of January, 1855."

of law in the appellate court that defendant knew plaintiff had been falsely imprisoned. This unique metamorphosis simply required the solemn invocation of the magic talisman "Ignorance of the Law is No Excuse" and, presto, the facts appeared.

Having decided that plaintiff could sue in assumpsit, the court then had to determine whether the facts made out such a cause of action. As its major premise the court cited the principle that when labor was performed for the benefit of X and X knew or consented to its performance, then X was liable to pay for the work upon an implied promise. This axiom, in turn, however, raised the problem whether defendant was cognizant that plaintiff was performing these services. *Rather than infer it from the agreed facts, which would mean performing a function of the trier of fact in a trial court, the court presumed it:* that is, it implicitly created a "presumption" that a lessee of a state prison farm knows that his prisoners are working for his benefit.

Thus, the court arrived at the correct result without deviating from accepted legal norms. But in order to rationalize the invocation of those norms as decisional norms, the appropriate facts invoking their application had to be found in the record. Where the record was lacking, a presumption was pressed into service to create facts as a matter of law. To some extent, therefore, a presumption is not a mechanism regulating proof production, but an inference drawn by an appellate court to justify the imposition of legal maxims rationally required to support a legal conclusion without violating the axiom that fact finding is peculiarly within the province of the trier of fact.

4. Societal Myth.

In criminal cases there is a presumption of innocence. If this were really a "presumption", it again would serve no purpose, since the burden of persuasion is upon the shoulders of the prosecution. In fact, it is not a presumption at all, but a method of fixing an accepted state of mind, that is, of orienting the trier of fact to its duty. In effect, it is a way of saying that the trier of fact ought not to draw any unfavorable inference from the mere fact that defendant is on trial in the first place.¹⁹⁶ Alternatively, this same presumption is also just

196. While sitting on the Superior Court in Massachusetts Judge Lummas once refused to give a ruling that the defendant in a homicide case was presumed to be innocent. Instead he charged the jury, inter alia, that "The fact that a person is in custody, or is charged with a crime . . . is not even the slightest evidence of his guilt, and is not to create any prejudice or unfavorable impression against him in your minds. . . . As I have already told you, in a criminal case the Common-

another way of saying that the burden of proof is on the State in criminal cases. In this sense, it is clearly redundant,¹⁹⁷ but, nonetheless, it is a typical mode of legal expression.¹⁹⁸

5. An Assumption.

At the trial the parties introduce facts into evidence according to certain rules of procedure and evidence enforced by the law giver, and upon the basis of these facts, the trier of fact arrives at a certain degree of belief in favor of one party or the other, thus resolving the dispute. In order to keep the size of the case under control, however, policy dictates that as many facts as possible be taken for granted in order to narrow the range of dispute. Procedure operates to this end: facts alleged but not denied are taken to be true. Evidence operates to this end: all but relevant facts having a tendency to prove a material issue are excluded. And, lastly, presumptions operate to this same end while the trial of an issue of fact is in progress: even within the area of factual dispute as delineated by the pleadings, as many facts as possible are taken to be true.

In *Scott v. Wilmeroth Service and Cold Storage Co.*,¹⁹⁹ for example, plaintiff was a grower who stored his apples in defendant's

wealth has the burden of proving the guilt of the defendant beyond reasonable doubt, in order to convict him." It goes without saying that Judge Lummus was reversed. *Commonwealth v. Madeiros*, 255 Mass. 304, 151 N.E. 297 (1926). See the instructions to be read to the jury proposed by Professor McBaine in *Burden of Proof: Presumptions*, 2 U.C.L.A.L. REV. 13, 20 (1954): "The court instructs the jury that the defendant is presumed to be innocent of the crime which he is charged to have committed. You are instructed that the fact that an indictment has been returned against the defendant . . . is not the slightest evidence of his guilt and must not create any prejudice or furnish any unfavorable inference against him." See also McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 264 note 39 (1944).

9 WIGMORE, EVIDENCE § 2511 (3d ed. 1940): "But this term has been the subject of two special fallacies, namely, 1, that it is a genuine addition to the number of presumptions, and, 2, that it is per se evidence."

197. WIGMORE, EVIDENCE § 457 (Stud. ed. 1935): "For all crimes it used to be said that there is a presumption of innocence. But most courts now recognize that this is merely the equivalent of the settled rule that a crime must be proved by the prosecution beyond a reasonable doubt." (This statement reflects a slightly over-optimistic mood at the time on the part of its author.)

198. FRANK, LAW AND THE MODERN MIND 181 (6th ed. 1949): "What a crop of subsidiary semi-myths and mythical practices the jury system yields! Time and money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or a sentence, meaningless to the jury, has been included in or omitted from the judge's charge." WIGMORE, EVIDENCE § 447 (1) (Stud. ed. 1935): "These definitions serve as an arsenal from which the unscrupulous defense practitioner often selects, in order either to confuse the jurors into a state of skepticism of all proof or to trick the trial judge into refusing a definition which has in some earlier precedent been condemned."

199. 159 Wash. 77, 292 Pac. 99 (1930).

warehouse. X came to defendant and offered to buy ten carloads of apples at \$2.50 a box on the spot. Not having any apples of its own on hand, defendant wired plaintiff about the offer and plaintiff wired back authorization to accept it. But then X and defendant entered into a contract making provision for credit. X, however, defaulted after the apples were loaded aboard the boxcars: at this moment plaintiff demanded the return of his apples but defendant refused. Instead, purporting to act under the contract with X, defendant shipped off the apples to auction where sale realized a sum far less than \$2.50 a box.

Plaintiff sued defendant alleging that he had been damaged by defendant's refusal to return the apples upon demand and the case was tried on the rather narrow issue as to whether defendant had exceeded its authority in extending credit to X. In any event, the jury returned a verdict for plaintiff and awarded plaintiff the difference between \$2.50 a box and the money realized by defendant at auction, which defendant had already turned over to plaintiff. It was then that defendant appealed arguing that there was no proof that \$2.50 was the market price of the apples at the time of the demand and refusal and, therefore, no proof that plaintiff had actually been damaged by defendant's refusal to let plaintiff peddle his own apples. The court, however, answered the appellant's argument with dispatch:

"There is no evidence that the appellant contracted to sell them above the going market price, and no evidence that there had been any marked decrease in the going market price at the time the owners themselves sought the opportunity to sell them. The presumption is that prices of commodities remain stationary until the contrary is shown, and we cannot think that the recovery was in excess of that permissible under the evidence."²⁰⁰

Thus, the case was disposed of on the basis that (1) there was an implicit presumption that the defendant-X sale was pegged at the market price and (2) a further explicit one that the market price remained the same until plaintiff tried to intervene to sell his own apples. Ergo, the jury applied the correct measure of damages!

Thus, the jury believed that the original contract called for \$2.50 and from this inferred that \$2.50 was the market price at the time of the conversion. As a matter of inference piled upon inference commingled with several dubious assumptions, this might not have been enough evidence upon which the jury could as a matter of simple

200. 159 Wash. 77, 292 Pac. 99, 101 (1930).

fact finding, premise its conclusion.²⁰¹ The conclusion required the belief that \$2.50 was the contract price, the assumption that the parties to a bargain always arrive at a price at the market price, the inference from this that \$2.50 was that price, followed by the assumption that the market price was not subject to rapid fluctuation, and the final inference that the market value at the time of the conversion was therefore \$2.50. By treating the assumptions as presumptions arising upon proof that the contract price was \$2.50, the court ratified the jury's conclusion and gave the jury's assumptions the force of law.

Thus, on the one hand, there are presumptions which are mechanisms used to modify the burden of proof at trial of an issue of fact for reasons of policy. On the other hand, there are assumptions, that is, general propositions of common knowledge which are treated as presumptions in order to affirm a conclusion or belief premised upon otherwise insufficient relevant evidence. The difficulty is that every principle of reason applied by a jury in reaching a conclusion, if that conclusion is upheld by an appellate court, can become another "presumption", making that term synonymous with the sum total of man's working hypotheses and assumptions. In turn, the mass of assumptions listed as "presumptions" in the lawbooks makes a definition of actual presumptions used at trial nearly impossible.

6. True Presumptions.

Taking again our classic example of the master's vehicle we saw upon the introduction of some evidence that there was an accident involving a vehicle owned by a master, driven at the time by his servant, that a presumption arose which, standing by itself, compelled the finding that the servant was acting at the time within the scope of his authority.²⁰² Thus, the proponent of the master's liability under the doctrine of respondeat superior is relieved of the onus of actually proving agency: if the trier of fact finds the basic fact to be true more probably than not, then a "proof mechanism" will credit the proponent

201. Had the court decided to reverse, the following language would have been invoked. "The proof of an ultimate fact may be made in two manners, the one by direct or, as it is sometimes called, testimonial evidence, and the other by indirect, or as it is frequently denominated, circumstantial evidence. But it is the rule of law that while a conclusion as to an ultimate fact may be based upon an inference from circumstantial evidence, in reaching such conclusion the inference as to the ultimate fact may not be based on an inference as to the existence of the circumstantial facts." See *New York Life Ins. Co. v. McNeely*, 52 Ariz. 181, 79 P.2d 948 (1938). See also *United States v. Ross*, 92 U.S. 281, 283 (1876). Thus, the no inference on an inference rule continues to be used "whenever appellate courts find it convenient to exercise control." MORGAN, MAGUIRE AND WEINSTEIN, *CASES AND MATERIALS ON EVIDENCE* 336 (4th ed. 1957).

202. See text *supra* at page 15.

with a *fait accompli* and the trier of fact must find agency to exist as a matter of law. Thus, a presumption is a mechanism operative at trial which relieves the party, upon whom rests the burden of persuasion, of the necessity to introduce evidence of particular facts until the opponent comes forward with some evidence of his own to rebut the presumption.

A presumption, therefore, is a mechanism which is operative during the trial of an issue of fact which serves to relieve a proponent of proving a particular fact until an opponent acts. The purpose of invoking the mechanism, first of all, is based upon the judicial appraisal of the relative accessibility of proof relevant to the presumed fact.²⁰³ In the instance of agency, the master has proof within his control, and hence, the proponent is relieved from proof until the master first comes forward with the proof in his possession. Thus, a presumption is a mechanism used within the context of the adversary system of litigation for the purpose of equalizing the contest.

Again, a presumption may serve the function of "proof generator." For example, when a husband disappears and remains away unheard from for an extended period of time, his wife is presented with a problem of proof if she is the beneficiary under a life insurance policy payable upon proof of the husband's death. The problem is simple enough and the solution is equally simple: upon the introduction of evidence of continuous absence away from home for seven years, unheard of by persons who would naturally have received news from the absentee, the law will create a presumption that the missing person is dead. Thus, a presumption creates proof, for upon the requisite belief in such an absence, the trier of fact must find death to be the fact.²⁰⁴ What is more, a presumption may be designed to "promote a determination in accord with the preponderance of probability,"²⁰⁵ where the basic fact justifies a strong inference toward the presumed fact. Thus, the law often requires the conclusion, in the event of an un-

203. Morgan, *Some Observations Concerning Presumptions*, 44 HARV. L. REV. 906, 926 (1931): "Other presumptions have their origin in considerations of the comparative convenience with which the parties can produce evidence of an issue of fact." WIGMORE, EVIDENCE 455 (Stud. ed. 1935): ". . . [A]ll burdens and presumptions are based on experience in trials and on ideas of fairness as between the parties. . . ."

204. MORGAN, MAGUIRE AND WEINSTEIN, CASES AND MATERIALS ON EVIDENCE 441 (4th ed. 1957): "In some instances the courts have created a presumption in order to avoid a procedural impasse where evidence of the existence or non-existence of the presumed fact is lacking. It is now generally held that unexplained absence for seven years and lack of news . . . raise a presumption of his death."

205. Gausewitz, *Presumptions in a One-Rule World*, 5 VAND. L. REV. 324, 329 (1952). In this article at this citation is an excellent summary of Professor Morgan's classification of the *raisons d'être* behind presumptions.

explained death by violent injury, that the death was not suicidal, until evidence of self-destruction is offered.²⁰⁶

Thus, presumptions are mechanisms used at the trial level which either create proof, give added incentive to the probability that the result will be in accord with the usual experience, or which modify the burden of proof in order to equalize the contest. They serve as an expedient mechanism used at the trial of an issue of fact to make adjustments in the burden of proof to fit peculiar situations. But these are various purposes for the creation of presumptions: they are not reasons why presumptions should differ in strength one from the other. If in our agency case, for example, the opponent denies the presumed fact under oath, the presumption would dissolve as a matter of law under the Thayer practice.²⁰⁷ In this event, the proponent is either without proof, or, if the basic fact is relevant to the presumed fact, is more likely without enough proof to support a verdict. At this point, extra-trial considerations of policy may enter the picture and the law giver may allow the trier of fact to find the presumed fact to be more probably than not true on the basis that a permissive inference exists between the basic and presumed facts.²⁰⁸ In a mobile society *realpolitik* may dictate that a stronger presumption is necessary to encourage tighter controls over the use of motor vehicles by non-owners. Thus, while the presumption itself is a mechanism of expedience to facilitate the trial of issues of fact, its strength can be manipulated in order to achieve social policies which transcend the trial itself.

7. Certain Observations at Large.

Relative to the varied usage of the concept of presumptions Professor Maguire has observed:

"... This word presumption has suffered badly from rough and careless handling. It has been used as a synonym for inference and sometimes as the operative part of weasel-worded formulae for saying that from the judicial or legislative point of view certain things are taken as true and attempts to contradict them will be futile. In the former usage the word has often been expanded into the term 'presumption of fact' and in the latter into 'presumption of law' or 'conclusive presumption.' . . . [W]e are rejecting both these usages and employing presumptions to de-

206. See *Jefferson Standard Life Ins. Co. v. Clemmer*, 79 F. 2d 724 (4th Cir. 1935). But see *Watkins v. Prudential Ins. Co.*, 315 Pa. 497, 173 Atl. 644 (1934).

207. See text *supra* at note 78.

208. See text *supra* at note 147.

note the concept, illustrated specifically dozens of times in common or statute law, that when a designated basic fact or aggregate of facts exists, existence of another fact or aggregate of facts, called the presumed fact or facts, must be assumed in the absence of adequate rebuttal. . . ." ²⁰⁹

In turn, Professor Laughlin has asserted:

"In checking source material relative to various of the presumptions referred to, it soon becomes evident that the word has been so promiscuously used as to be devoid of much of its utility. The language of the law is permeated by 'magic words,' such as the word *res gestae*, which are used as substitutes for exact analyses. The word 'presumption' is rapidly becoming such a word. It has been used to indicate numerous and unrelated rules of substantive and procedural law. In most instances its use could be entirely eliminated without effecting the thought. Courts have too frequently behaved like law students when pushed to solve a particular problem. Instead of analysing they glibly seize upon such and such a presumption." ²¹⁰

Thus, in so far as the analysts are concerned, the term "presumption" has a definite meaning within the legal system. The problem then becomes threefold. First, the case law over the period of the last twenty years ought to be examined in order to determine what the courts are in fact doing. Secondly, on the basis of these cases, it ought to be possible to see whether the growing awareness of the "real meaning" of the term presumption, which has been growing in the analytical circles, is mirrored by a proportionate sense of "real meaning" within the courts. Lastly, a rationale of presumptions within the context of the working law ought to be formulated.

This last task means nothing more than an attempt to bring order out of the cases and to establish criteria which take into account the

209. MAGUIRE, *EVIDENCE: COMMON SENSE AND COMMON LAW* 183 (1947):

210. Laughlin, *In Support of The Thayer Theory of Presumptions*, 52 MICH. L. REV. 195, 195-96 (1953). Professor Laughlin sees "presumption" used in the following senses: (1) as indicating a general disposition of courts, (2) as an authoritative reasoning principle, (3) as a rule of substantive law, (4) as a rule fixing the burden of persuasion, (5) as a statutory *prima facie* case, (6) as a permissible inference, (7) as a proposition of judicial notice, and (8) as a rule shifting the burden of producing evidence. As the title of his article would indicate, he takes the view that the eighth category is the one distinctive conception of the term presumption. Professors Morgan and Maguire, on the other hand, have listed four senses in which the term "presumption" is used: (1) as synonymous with permissible inference, (2) as establishing a case sufficient to permit the trier of fact to decide that the presumed fact exists, even though no logical inference of the presumed fact may be made from the basic fact, (3) as requiring the acceptance of the presumed fact until certain specified conditions are met, and (4) as a conclusive presumption or rule of substantive law. MORGAN AND MAGUIRE, *CASES AND MATERIALS ON EVIDENCE* 73-75 (3d ed. 1951).

real differences between the position of the analyst within the sanctuary of the law school and the judges and lawyers dealing with practical affairs. For example, in a great many instances the device, presumption, has been used by appellate tribunals where the word "inference" would more accurately describe the situation. Yet, it goes too far to say that every case ought to be reversed where there has been an oversight as to proof of even a minor fact which can safely be inferred on the basis of judicial experience with similar events. At the other extreme, the term presumption ought not to become so misunderstood as to mislead appellate tribunals into such a posture that the distinction between the function of the judge and the jury is in practice completely abolished.

Thus it is that our "introduction" has attempted to define the concept presumption as it "ought to be" and has looked into some of the actual usages of the term which do not accord with this analysis. Moreover, we have attempted to delineate what further tasks have yet to be accomplished in order to arrive at a rational theory of presumptions taken in the context of the law as a whole. Thus, it is hoped, the reader has been "introduced" to presumptions. Further ratiocination, however, must await a more expanded treatment.